

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LENZZIE R. VANCE,

Petitioner,

v.

CASE NO. 2:10-CV-00746
JUDGE MARBLEY
MAGISTRATE JUDGE KING

WARDEN, HOCKING CORRECTIONAL
FACILITY,

Respondent.

OPINION AND ORDER

On November 3, 2011, the Magistrate Judge issued an *Order and Report and Recommendation*, denying Petitioner's request for an evidentiary hearing, stay of proceedings and production of documents, granting Respondent's motion to strike, and recommending that the petition for a writ of habeas corpus be dismissed. *See* Doc. No. 31. Petitioner has filed objections to the Magistrate Judge's *Order and Report and Recommendation*. Doc. No. 39. For the reasons that follow, Petitioner's objections are **OVERRULED**. The *Order and Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

Petitioner objects to all of the Magistrate Judge's recommendations, as well as to the denial of his motion for an evidentiary hearing, request for stay and for production of documents. In his objections, Petitioner essentially again argues that he is actually innocent of the charges upon which he stands convicted and in fact is the victim of a manifest miscarriage of justice. He seeks an evidentiary hearing so that he may prove his innocence and introduce documents that have not been reviewed by the state courts in this case. In support of these allegations, Petitioner has attached his own affidavit, a magazine article from which the alleged victim purportedly created her allegations against Petitioner, a newspaper article from the Wilmington News Journal regarding attorney Diane

Menashe, what appears to be a Children Services investigative report and school visit document, a psychological evaluation by Jeffrey Smalldon regarding Sandra Williams, Danette Williams, Petitioner and Tiffany Williams, a letter from Smalldon to attorney Richard Palau, notes of an interview with Annie and Tom Bentley, and a copy of a transcript of an attempted interview with Tiffany Vance.

Pursuant to 28 U.S.C. § 636(b), this Court has conducted a *de novo* review of the record. For the reasons detailed in the Magistrate Judge's *Order and Report and Recommendation*, Petitioner's objections are **OVERRULED**. This Court is without authority to grant Petitioner his requested opportunity to contest the charges upon which he stands convicted. As discussed by the Magistrate Judge, the United States Supreme Court has held this Court may not properly consider a free-standing claim of actual innocence in these proceedings. *See Herrera v. Collins*, 506 U.S. 390, 400 (1993). His claim that his convictions were against the manifest weight of the evidence – which is a state law claim – fails to present an issue appropriate for federal habeas corpus review. Petitioner's claim that the retroactive application of *State v. Foster*, 109 Ohio St.3d 1 (2006), violated the Ex Post Facto Clause has repeatedly been rejected by state and federal courts. His remaining claims, reviewed for plain error or never presented to the state courts, have been procedurally defaulted and Petitioner has failed to establish cause and prejudice for those procedural defaults. As the Magistrate Judge reasoned, Petitioner's claim of ineffective assistance of counsel is without merit.

Petitioner can no longer return to the state courts to exhaust on-the-record claims not previously raised on direct appeal. Moreover, the record fails to reflect a basis for this Court's review of documents not previously provided to the state courts.

The *Order and Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

The Clerk is **DIRECTED** to enter **FINAL JUDGMENT**.

s/Algenon L. Marbley
ALGENON L. MARBLEY
United States District Judge